STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

KENNETH J. SPEICHER, ~~an Individual~~

Plaintiff-Appellee,

V

COLUMBIA TOWNSHIP BOARD OF TRUSTEES and COLUMBIA TOWNSHIP PLANNING COMMISSION,

Defendants-Appellants.

Supreme Court No. Publ opn 12-19-13

Court of Appeals No. 306684

Lower Court No. 11-600857-CZ

Van Buren P. Hamre

NOTICE OF FILING OF APPLICATION FOR LEAVE TO APPEAL

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL OF DEFENDANTS-APPELLANTS COLUMBIA TOWNSHIP BOARD OF TRUSTEES AND COLUMBIA TOWNSHIP PLANNING COMMISSION

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STATEMENT IDENTIFYING COMPLAINED-OF ORDER AND SETTING FORTH REQUESTED RELIEF

Defendants-Appellants the Columbia Township Board of Trustees and the Columbia Township Planning Commission (collectively referred to here as "the Township") seek leave to appeal from the Michigan Court of Appeals order of December 19, 2013, which granted Kenneth J. Speicher's motion for reconsideration and vacated the Court's January 22, 2013 opinion as to attorney fees, and from the Michigan Court of Appeals opinion on reconsideration issued on December 19, 2013 remanding this case to the trial court to award costs and attorney fees to Mr. Speicher under MCL 15.271(4). (Attached hereto as Exhibit G).

The Court of Appeals agreed with the Columbia Township Board of Trustees and the Columbia Township Planning Commission that under the plain language of the Open Meetings Act, Mr Speicher was not entitled to attorney fees under the facts of this case. But despite its disagreement with this outcome, the Court concluded that it was compelled to follow prior cases issued by the Court with which this panel of the Court disagreed. (Opinion, pp 1-2). As a result, the Court called for the convening of a special panel to consider the issue anew as is provided for under MCR 7.215(J)(3). But more than 28 days has elapsed and the Court has not convened a special panel, leaving the matter essentially unresolved. (Exhibit H, Order, 1/14/14).

Defendants-Appellants seek leave to appeal to consider whether the Open Meetings Act requires recovery of court costs and actual attorney fees when no

injunctive relief was provided as a result of the litigation. The question of when costs and attorney fees are proper is significant, both to citizens seeking to enforce the Open Meetings Act and to the state & local governmental bodies regulated by it.

The law is currently muddled with one line of decisions, which are listed in the Court of Appeals order vacating its decision in this case insofar as it pertained to attorney fees, and hold that attorney fees and court costs must be awarded any time regardless of whether the plaintiff succeeded in obtaining an injunction. *Craig v Detroit Pub Schs Chief Executive Officer*, 265 Mich App 572; 697 NW2d 529 (2005); *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78; 669 NW2d 862 (2003); *Morrison v City of East Lansing*, 255 Mich App 505; 660 NW2d 395 (2003); *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525; 609 NW2d 574 (2000); *Manning v East Tawas*, 234 Mich App 244; 609 NW2d 574 (2000); and *Schmiedicke v Clare Sch Bd*, 228 Mich App 259; 577 NW2d 706 (1998). At the same time, other published opinions offer conflicting analysis and outcomes that are inconsistent with the prior decisions. See *Leemreis v Sherman Twp*, 273 Mich App 691, 707-709; 731 NW2d 787, 795-797 (2007); *Ridenour v Dearborn Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981); *Felice v Cheboygan County Zoning Commission*, 103 Mich App 742; 304 NW2d 1 (1981); *Saline Area Schools v Mullins*, 2007 WL 1263974 (No 272558, Mich Ct App May 1, 2007) (unpublished).

These conflicting lines of opinions undermine confidence in the existing law. Given the importance of interpreting the Open Meetings Act correctly, for all

governmental bodies governed by it and the public and the press which rely on it to assure transparency in government, the issue is of extraordinarily high public significance and is vitally important to the jurisprudence of the state. MCR 7.302(B).

The Court of Appeals has published its decision on reconsideration reviewing the history of decisions discussing relief under the Open Meetings Act and pointing out the conflicting approaches to interpreting the statute that are set forth in various published decisions from the Court. *Speicher v Columbia Township Board of Trustees and Columbia Township Planning Commission*, No 306684 (Mich Ct App December 19, 2013). (Exhibit G). The *Speicher* court expressed disagreement with the current state of the law pointing out that some of its earlier decisions were dicta; yet later panels deemed themselves bound. (*Id.*). The *Speicher* court specifically noted that many of the decisions relied on prior precedent without analysis of potential distinctions in the kind of action brought and the distinct type of relief sought. (*Id.*).

Defendants-Appellants have found no decision by this Court addressing the matter or deciding the correct approach to analyzing the statute's relief provisions on this point. Thus, the issue has percolated for years in the lower courts without guidance from this Court regarding how to read and apply MCL 15.271(4).

Therefore, Defendants-Appellants urge review and a reversal of the Court of Appeals order remanding this case for an award of costs and attorney fees. Defendants-Appellants urge this Court to squarely hold that no costs or attorney fees are to be

awarded here because of the absence of injunctive relief on the basis of a proper interpretation of MCL 15.271(4).

STATEMENT OF THE QUESTION INVOLVED

Are costs and attorney fees properly denied under MCL 15.271(4) absent a showing that (1) a public body failed to comply with the Open Meetings Act, (2) a person has sued a public body to compel compliance or enjoin further noncompliance with the Act, and (3) the person succeeded in obtaining an award of injunctive relief in the action?

Defendants-Appellees Columbia Township Board of Trustees and Columbia Township Planning Commission say "YES".

Plaintiff-Appellant Kenneth J. Speicher says "NO".

The Court of Appeals answered "NO" on the basis that it was compelled to do so by MCR 7.215(J)(3). But under the plain language of the statute, the Court of Appeals concluded that the trial court correctly denied injunctive relief and correctly declined to award costs and actual attorney fees under the Open Meetings Act, and urged further review.

STATEMENT OF FACTS

A. The governing structure of Columbia Township, which includes both a Township Board of Trustees and a Township Planning Commission, established regular meetings for the Board and Commission.

The Board and the Commission are two different public bodies in Columbia Township. Speicher has named both of them as parties herein. The Board and the Commission are comprised of separate individuals. The Township Board consists of Dale Bradford, Mary Burgett, Danielle Nuismer, George Harrington, and Rosemary Hurley. The Planning Commission is made up of Jack Bowen, Thomas Fry, Leroy Abernathy, Bob Seamon, and Rosemary Hurley. In addition, each of these bodies has its own meeting times and dates as well as different business to conduct within the Township.

At its regular meeting of March 16, 2010, the Board voted unanimously on resolution No. 2010-08. (Exhibit A, Complaint, ¶5). That resolution fixed the regular meetings of the Board and of the Commission for the year 2010-2011. (*Id.*). Those included Commission meetings scheduled for January 17, 2011; February 14, 2011; and March 14, 2011. (Exhibit A, Complaint, ¶6).

B. The video of the Commission meeting of October 18, 2010 shows the events surrounding the Commission's decision to change Commission Meetings from a monthly to a quarterly basis.

On October 18, 2010, the Commission at its regular meeting recommended to the Board that, beginning in January of 2011, the Planning Commission meet on a quarterly

basis. (Exhibit A, Complaint, ¶18). The affidavits of Bowen, Abernathy, Fry, and Hurley establish that the decision by the Planning Commission to change from monthly to quarterly meetings was made by the Planning Commission at its October 18, 2010 meeting. A review of the video of that meeting confirms that.[1]

Jack Bowen attended the Planning Commission meeting on October 18, 2010. (Bowen aff, ¶2). He also reviewed the video of that meeting. (Bowen aff, ¶3). The video showed that, during the course of the meeting, Bowen made a motion that the Planning Commission change from monthly meetings to quarterly meetings. (Bowen aff, ¶4).[2] There was also a discussion as to whether the same pay per meeting would be

---

[1] The video of the October 18, 2010 Planning Commission meeting was attached as Exhibit B to the brief in support of summary disposition along with the affidavits of Planning Commission Members Bowen, Fry, Abernathy, and Hurley. [Exhibits C, D, E, and F, respectively]. The video reveals that the public was allowed extraordinary leeway to address the Commission on a wide range of issues even if not germane to the business being conducted by the Commission. This was clearly evidenced at the point in the video at which the Commission began to discuss revision of its scheduled meetings. Commissioner Jack Bowen moved that the meetings be changed from a monthly to a quarterly basis and that the Commission members be paid the same amount per meeting. The video shows nearly 20 minutes of discussion by members of the public on issues unrelated to the motion which had not yet even been seconded. It was not until the collateral topics were raised and acted upon by the Board that Commissioners Hurley, Abernathy, Fry and Bowen took up the change from monthly to quarterly meetings and the issue of the amount of pay per meeting.

[2] Consistently, the minutes of the October 18, 2010 Planning Commission recite as follows:

> Motion by Bowen. Sec. by Abernathy to recommend to the Board that the Planning Commission have quarterly meetings starting

in effect and, in his motion, Bowen proposed that the same pay apply for each meeting. (Bowen aff, ¶4). Bowen recalled that, while his motion was still on the table and prior to the Planning Commission approval of the motion, there was much discussion by the Planning Commission on a variety of topics unrelated to the motion. (Bowen aff, ¶5).

Bowen prepared the minutes of the October 18, 2010 meeting. Those reflected the motion that was made, to wit: that the meetings of the Planning Commission be moved from monthly to quarterly and that the Planning Commission recommend that the same pay apply per meeting. (Bowen aff, ¶6). Bowen confirmed that the Planning Commission never again during the meeting addressed the frequency of the Planning Commission meetings but just voted on the topic. (Bowen aff, ¶7). Bowen was also of the understanding that the Township Board did not vote on the frequency of the meetings because the issue was not presented to the Board and inasmuch as the Planning Commission had decided that its meetings were to be held on a quarterly basis. (Bowen aff, ¶8).

Planning Commission member Thomas Fry proffered a similar affidavit. There, Fry affirmed that the Planning Commission voted to have quarterly meetings. (Fry aff, ¶6). The Township Board did not vote on the frequency of the meetings issue because the question was not presented to the Board, the Planning Commission having considered it and decided on quarterly meetings. (Fry aff, ¶7).

> January 17, 2011, with same pay scale per meeting that is now in place . . .

C. The Township Clerk consulted with the Township Attorney and acted upon his advice.

The day after the October 18, 2010 meeting, Township Clerk Mary Burgett contacted Township Attorney Brian Knotek. Burgett advised Knotek that the Commission had voted to hold four meetings a year. She inquired whether the Township Board was required to approve the change or whether it was left to the Commission to simply change the schedule from a monthly to a quarterly basis. Attorney Knotek advised that four meetings per year were appropriate under MCL 125.382. Ms. Burgett also verified with Attorney Knotek that, as long as the Commission stayed within the amounts approved by the Board, the pay per meeting was appropriate. (Burgett aff, ¶3) [Exhibit G]. Based upon the advice that Mary Burgett received from Attorney Knotek, the pay recommendation, as moved by the Planning Commission, was not submitted to the Township Board for consideration. (Burgett aff, ¶4). Beyond that, Mary Burgett averred that, because the Planning Commission meeting dates would be changed for the quarterly basis starting in 2011, she contacted the *South Haven Tribune* to publish the new meeting schedule for the Planning Commission meetings. (*Id.*). She had contact with the *South Haven Tribune* by way of an e-mail. In order to provide further notice to the public of the meetings scheduled for the Planning Commission, Clerk Burgett posted a revised schedule on the

window adjacent to the entrance door of the Township Hall. She "whited out" the dates for meetings in February and March of 2011. (Burgett aff, ¶6).[3]

Speicher did not appear for the Commission's January 17, 2011 meeting. No meetings of the Columbia Township Planning Commission were held on February 14, 2011 or on March 14, 2011. Speicher insists that he wanted to raise numerous issues with the Planning Commission at those meetings. (Speicher aff, ¶14). He claims to have appeared for the meetings. (Speicher aff, ¶15). No member of the Planning Commission or the Zoning Court of Appeals or the Zoning Administrator showed up on either February 14, 2011 or March 14, 2011. (Speicher aff, ¶16). Speicher had a list of approximately 150 concerns and comments about the Township's new proposed zoning ordinance. (Pltf's supplemental aff, ¶3).[4]

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[3] Defendants cannot affirmatively state when Mary Burgett posted the newly revised schedule of Commission meeting dates after whiting out the February 14, 2011 and March 14, 2011 dates. However, there is no question that Mary Burgett did post the notice in a visible place in the window adjacent to the entrance door of the Township Hall. She also had the new schedule of meeting dates published in the *South Haven Tribune*.

[4] For example, Speicher claimed that his property in Columbia Township had been adversely affected by the actions of the Dutch Mill Tavern, a business in close proximity to his property. In particular, Speicher charged that the Dutch Mill Tavern closed off one of its access points to the Tavern parking lot and that resulted in an extraordinary increase in traffic on the fire lane which was his only means of ingress and egress to the property. (Exhibit A, Complaint, ¶26).

D. The circuit court denied Speicher's request for various forms of relief based upon an alleged violation of the Open Meetings Act.

Speicher commenced this action with the filing of a complaint on April 11, 2011. Speicher based his request for various forms of relief upon his contention that the decision of the Planning Commission to hold its meetings on a quarterly, instead of a monthly, basis was made at a meeting that was not open to the public. Speicher also insisted that an Open Meetings Act violation occurred when notice of the change of the scheduled meeting dates of the Planning Commission was not timely posted. To the contrary, defendants urged that no Open Meetings Act violation occurred relative to the decision to change the schedule of the Planning Commission meetings from a monthly to a quarterly basis.

Arguing that the Township Board never acted on the recommendation of the Township Commission and that no notice was published after the October 18, 2010 meeting notifying the public of a change in schedule for the Commission's regular meetings, Speicher moved for summary disposition pursuant to MCR 2.116(C)(10). Speicher's position was based on the unsupported supposition that the Open Meetings Act was violated when at some unspecified date and time, a secret meeting was held at which it was decided that the Planning Commission meetings would be held on a quarterly instead of a monthly basis.

Defendants filed a brief in opposition to Speicher's motion for summary disposition along with a cross motion for summary disposition pursuant to MCR

2.116(I)(2). There, defendants took the position that, at all times, the Board had no involvement in the action giving rise to Speicher's complaint and that, even if the notice of a change of meeting dates was not posted within three days after the decision made by the Planning Commission, efforts to alert the public to the change in the meeting schedule rendered Speicher's complaint a "technical violation" for which no relief was afforded under the Open Meetings Act. In submitting that the uncontroverted evidence demonstrated that the decision to change the meeting schedule of the Planning Commission was made by the Planning Commission itself, at the October 18, 2010 meeting, defendants relied upon the video of that meeting as well as affidavits from Planning Commission members. Defendants also described as "clear and uncontradicted" evidence that the notice of a change in the schedule of Planning Commission meetings was, in fact, posted on the window at the Township Hall as well as published in the *South Haven Tribune*, and that this occurred well in advance of February, 2011 and March, 2011. In sum, defendants argued that, if any, only a technical violation of the Open Meetings Act had occurred.

Defendants later filed a supplemental brief in opposition to Speicher's motion for summary disposition. The supplemental filing was predicated upon new deposition testimony. Specifically, defendants contended that the testimony of Mr. Speicher and Dixie Kovachs, as well as the documentary evidence received from them, conclusively established that they had every opportunity to address their concerns before the Board

of Trustees, the Planning Commission, and the Township Zoning Board of Appeals so that none of the purposes underlying the Open Meetings Act had been implicated in this lawsuit.

Speicher replied to and opposed defendants' cross motion for summary disposition. The circuit court entertained oral arguments on August 29, 2011. During the course of those, the circuit court observed that the dispute had nothing to do with making decisions at open meetings, but rather related only to the issue of when public bodies were going to meet. (Exhibit C, Tr 8/29/11, p 9). Accordingly, the circuit court directed Speicher to advise the court as to how this affected Speicher inasmuch as the court had been "very liberal" with Speicher's position and that Speicher's contentions were getting more and more technical as exemplified by this case where no meeting was held and Speicher was not denied access to a meeting. (*Id.*).

In denying Speicher's motion for summary relief, the circuit court stated that it did not find the situation violated the Open Meetings Act. Rather, the circuit court opined that the whole matter was "technical" in nature and that the Township acted in good faith to post the necessary notices. The fact that the Township officials may have decided that they had to have fewer meetings was not actionable at least on the facts presented to the circuit court. Therefore, the circuit court denied Speicher's motion. (Exhibit C, Tr 8/29/11, p 20).

On September 9, 2011, the circuit court signed an order setting forth it rulings. It entered an amended order denying plaintiff's motion for summary disposition and granting defendants summary disposition and dismissing plaintiff's complaint on September 23, 2011. Thereafter, Speicher timely filed a motion for reconsideration.

In an opinion and order regarding plaintiffs' motion for reconsideration of the Court's amended order denying plaintiff's motion for summary disposition and granting defendants summary disposition and dismissing plaintiff's complaint entered on September 23, 2011, the circuit court rejected Speicher's request for a rehearing. In denying Speicher's motion, the circuit court reasoned as follows:

> Plaintiff's complaint concerns the elimination of two planning commission meetings that may not have been done in strict compliance with the Open Meetings Act. Plaintiff complains that he wished to address the planning commission regarding whether the zoning administrator had the power to enforce the zoning ordinances. While the amendments to the planning commission meeting schedule may have been in violation of the Open Meetings Act, the Court is not inclined to overturn its earlier finding that the violations, if any, were technical in nature, and did not impair the rights of the public in having their governmental bodies make decisions in an open meeting. This is not a case where the planning commission met and took action in violation of the Open Meetings Act. The planning commission did not hold a meeting on a date they had previously scheduled but then eliminated. Plaintiff may have been inconvenienced in going to the Township Hall for a meeting that was not held, but the Court is of the opinion that the conduct of the defendants is not actionable under the Open Meetings Act. Plaintiff had the option of bringing his concerns to the planning commission at its next regularly scheduled meeting.
>
> The Court is not convinced that it committed a palpable error justifying reversal of its earlier decision . . . .

E. The Michigan Court of Appeals issued an unpublished opinion, and then on reconsideration, a second opinion, which was published, and an order vacating one portion of its earlier order and remanding the case.

The Michigan Court of appeals issued two opinions in this case. Its first opinion, issued on January 22, 2013 held that Mr. Speicher was entitled to summary disposition in his favor and declaratory relief on the basis that the Columbia Township Board of Trustees and Columbia Township Planning Commission "did not post notice of this change [a change from holding monthly to quarterly meetings] on or before October 21, 2011, i.e., within 3 days of the October 18, 2011, meeting at which the Commission changed its regular meeting schedule." (Exhibit F, Opinion, p 1, January 22, 2013). But the Court specifically rejected Mr. Speicher's assertion that the schedule was changed at a meeting that was not open to the public.

The Court of Appeals also expressly approved the trial court's denial of Mr. Speicher's request for injunctive relief noting that the failure to timely post the new meeting schedule was a "technical violation of the Open Meetings Act," there was no evidence that the violation was done willfully, and no evidence that the public was harmed in any way by the technical violation. (*Id.* at p 2). The Court also specifically noted that Mr. Speicher's claim of injury was not based on the failure to timely post the meeting change, but from the change in the meeting schedule, and in any event, Mr. Speicher "did not suffer the injury he claim[ed] to have suffered, as it is undisputed that plaintiff had the same opportunity as every other citizen to address the Commission at

the meetings it did hold, and plaintiff presented the issues he was concerned about to the Commission at the December 2010, January 2011, and the April 2011 meetings." (*Id.*). As a result, the Court of Appeals correctly concluded that "no injunctive relief was warranted."

Mr. Speicher sought reconsideration arguing that regardless of whether he requested or obtained injunctive relief, he was entitled to costs and attorney fees under the Act. He relied on a series of published decisions from the Court of Appeals, which held that costs and attorney fees are required to be awarded in any Open-Meetings-Act suit in which the plaintiff obtains relief for a violation of the Act, regardless of whether injunctive relief is awarded and regardless of whether proof of an injury is presented.

On reconsideration, the Court of Appeals issued an order vacating that "portion of this Court's opinion issued January 22, 2013 as to attorney fees". (Exhibit G, Order, December 19, 2013). The Court also issued a subsequent opinion explaining that it disagreed that Mr. Speicher was entitled to attorney fees under the facts of the case but that it was compelled to follow prior published opinion under MCR 7.215(J)(2). The Court called for the convening of a special panel to consider the issue. But the Court of Appeals has not convened a special panel. (Exhibit H, Order, 1/14/14).

ARGUMENT

Costs And Attorney Fees Are Properly Denied Under MCL 15.271(4) Absent A Showing That (1) A Public Body Failed To Comply With The Open Meetings Act, (2) A Person Has Sued A Public Body To Compel Compliance Or Enjoin Further Noncompliance With The Act, And (3) The Person Succeeded In Obtaining An Award Of Injunctive Relief In The Action

A. MCL 15.271(4) governs when a person is entitled to recover court costs and actual attorney fees and does not authorize such a recovery in the absence of a successful suit for injunctive relief for non-compliance with the Act.

1. This Court reviews issues of statutory interpretation such as this one de novo.

When interpreting a statute, a court's primary objective is to ascertain and to effectuate the intent of the legislature. To do so, a court begins with the language of the statute itself, *Lash v Traverse City*, 479 Mich 180; 735 NW2d 628 (2007). *Renny v Dept of Transportation*, 478 Mich 490; 734 NW2d 518 (2007), the Court taught noted that courts approach the task of statutory interpretation by seeking to give effect to the legislature's intent as expressed in the statutory language. Thus, the primary goal of statutory interpretation is to give effect to the intent of the legislature, *Brahm v Mayor of Detroit*, 478 Mich 589; 734 NW2d 514 (2007). This means that the paramount concern in statutory construction matters is identifying and effectuating the legislature's intent, *Wexford Medical Group v City of Cadillac*, 474 Mich 192; 713 NW2d 734 (2006). The language of the statute is the best source for ascertaining its intent, *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012). Stated otherwise, when the statute is clear and

unambiguous, judicial construction or interpretation is unwarranted, *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

2. ***The Legislature has primacy when dealing with statutes and review is appropriate when decisions interpreting and applying the language conflict, present a confusing discussion of the rationale and outcome under the statute, and deviate from the legislative intent as embodied in the statutory language and structure as it was enacted.***

Under our constitutional system of government, this Court is obligated to enforce legislative dictates as written. *WPW Acquisition Co v City of Troy*, 466 Mich 117, 124-125; 643 NW2d 564, 568 (2002). Legislative supremacy, as a doctrine of statutory interpretation, is grounded in the notion that, except when exercising the power of judicial review, courts are subordinate to legislatures. See Richard Posner, *Law and Literature: A Misunderstood Relation*, 240, 252-53 (1988) (the judiciary must search for the intent of the legislature in statutory interpretation); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 Mich L Rev 20, 22 (1988) (describing as "archaeological" statutory interpretation that seeks to fulfill the intent of the drafting legislature and discussing various methods of interpretation which attempt to respect the legislature's primacy). Separation of powers principles require the judiciary to respect legislative policy choices. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 405; 605 NW2d 300 (2000). This deference to legislative policy-making stems from the Court's understanding of its constitutional role and its recognition that the legislature is better-

situated to assess the trade-offs associated with a particular policy choice than is the judiciary. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562; 702 NW2d 539 (2005).

Longstanding precepts of statutory interpretation require the court to give effect to the language when it is unambiguous. *Reed v Yackell*, 473 Mich 520; 703 NW2d 1 (2005). In interpreting statutory language, courts must determine and give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). The first step in ascertaining legislative intent is to look at the words of the statute itself. *House Speaker v State Admin Bd*, 441 Mich 547; 495 NW2d 539 (1993). In *Lesner v Liquid Disposal, Inc*, 466 Mich 95; 643 NW2d 553 (2002), this Court emphasized its obligation to enforce the statutory text as written by stating:

> We may not read anything into the unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.... In other words, the role of the judiciary is not to engage in legislation.

(*Id.*, citing *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) and *Tyler v Livonia Public Schools*, 459 Mich 382, 392-393, n 10; 590 NW2d 560 (1999)).

Review is critically important here because the Open Meetings Act and the relief available are matters of public interest. And although the issue of when actual attorney fees can be awarded arises frequently, this Court has not addressed it. At the same time, the decisions by the lower courts present a hopeless muddle of confused precedent.

The holding providing that "the imposition of attorney fees is mandatory upon a finding of a violation of the OMA." (Exhibit G, *Speicher* slip op, p 3, December 19, 2013 citing *Craig v Detroit Public Schools Chief Executive Officer*, 265 Mich App 572; 697 NW2d 529 (2005) was made "without analysis" and amounted to dicta since no attorney fees were awarded because the court found no violation. Exhibit G, *Speicher* slip op, p 3). This overly broad dicta was based on citation to other published decisions, many of which did not include any analysis or discussion of the specific statutory provisions that govern relief under the Act. See *Schmiedicke v Clare Sch Bd*, 228 Mich App 259; 577 NW2d 706 (1998); *Manning v East Tawas*, 234 Mich App 244; 609 NW2d 574 (2000); *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525; 609 NW2d 574 (2000); *Morrison v City of East Lansing*, 255 Mich App 505; 660 NW2d 395 (2003); *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78; 699 NW2d 862 (2003). While past precedent from the court of appeals has repeated the broad rule that an award of attorney fees and costs is mandatory if a violation of the Open Meetings Act is found, the *Speicher* panel concluded that "existing case law has morphed from the initial *Ridenour v Dearborn Bd of Ed*, 111 Mich App 798; 314 NW2d 760 (1981) opinion in 1981, in which attorney fees were warranted only because plaintiff received the equivalent of an injunction (and where the trial court stated it *would* have issued an injunction but for the promise of defendant to comply in the future) to current day opinions, where attorney fees are awarded on the mere showing of a violation of the Open Meetings Act (and no showing

of obtaining the equivalent of injunctive relief is needed)." (Exhibit G, *Speicher* slip op, p 5). The Court recognized that the *Ridenour* decision "has been diluted or ignored in subsequent cases." (*Id.*).

In other words, *Ridenour* took liberties with the plain language of the Open Meetings Act, which provides for an award of attorney fees and court costs upon the "obtaining relief" in a "civil action against the public body for injunctive relief to compel compliance or enjoin further noncompliance with the act". MCL 15.271(4). *Ridenour* read this language to allow recovery despite the determination not to provide injunctive relief, a judicial gloss on the statute. If the Legislature has clearly expressed its intent in the language of a statute, the statute must be enforced as written free of any contrary judicial gloss. *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010); *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). The judicial gloss in *Ridenour v Bd of Education of the City of Dearborn School District*, 111 Mich App 798; 314 NW2d 760 (1982) has since morphed into an absolute rule requiring costs and attorney fees for any violation even if no injunctive relief is awarded and even if no suit for injunctive relief was ever brought.

This Court has not spoken about the issue and thus, only intermediate appellate published authority exists on the subject. In these circumstances, review is in order to re-examine existing intermediate appellate authority in light of the plain language of the statute.

B. Neither the plain language nor the structure of the statute supports an award of costs and actual attorney fees in an action against a public entity under MCL 15.271(4) absent a successful action for injunctive relief.

The relief to be afforded under the Open Meetings Act was specified by the Michigan Legislature in a series of provisions including MCL 15.271-273. These provisions govern when an enforcement action can be brought, by whom, and in what venue. MCL 15.271. The Legislature also provided for carefully calibrated relief, including allowing for civil and criminal penalties against public officials who intentionally violate the act. MCL 15.272-273.

But the remedy at issue here is whether court costs and actual attorney fees should be imposed under MCL 15.271(4). MCL 15.271(4) provides:

> (1) If a public body is not complying with this act, the attorney general, prosecuting attorney of the county in which the public body serves, or a person may commence a civil action to compel compliance or to enjoin further noncompliance with this act.
>
> (2) An action for injunctive relief against a local public body shall be commenced in the circuit court, and venue is proper in any county in which the public body serves. An action for an injunction against a state public body shall be commenced in the circuit court and venue is proper in any county in which the public body has its principal office, or in Ingham county. If a person commences an action for injunctive relief, that person shall not be required to post security as a condition for obtaining a preliminary injunction or a temporary restraining order.
>
> (3) An action for mandamus against a public body under this act shall be commenced in the court of appeals.
>
> (4) If a public body is not complying with this act, and a person commences a civil action against the public body for injunctive

> relief to compel compliance or to enjoin further noncompliance with the act and succeeds in obtaining relief in the action, the person shall recover court costs and actual attorney fees for the action.

The language in subsection (4) is clear and explicit. The provision starts with "if," a word that renders application of the final clause, "the person shall recover court costs and actual attorney fees for the action," dependent on a showing that each of the three requirements included have been satisfied. Thus, court costs and attorney fees are available as relief "if":

- "a public body is not complying with this act"
- and "a person comments a civil action against the public body for injunctive relief to compel compliance or enjoin further noncompliance with the act"
- "and succeeds in obtaining relief in the action"....

MCL 15.271(4). Only when all three of these preconditions have been satisfied does the provision provide for recovery of "court costs and actual attorney fees." MCL 15.271(4).

The word "if" makes clear that what follows is a condition, and as the Michigan Legislature did in MCL 15.271(4), the text "unearth[s] hidden conditions" by making them explicit; drafters are encouraged to achieve this clarity by placing "conditions where they can be read most easily, preferably using the word *if*." *Guidelines for Drafting and Editing Court Rules*, Bryan A. Garner, p 5 (2007). Here, the drafters of the Open Meetings Act employed the word "if" at the start of the provision, followed it by

a series of conditions, each connected with "and", and then followed those with the final "then" clause, which describes the relief available upon a showing that the conditions all have been met. Despite these statutory guidelines, and the plain meaning of "if" as a signal that a condition must be satisfied, under the current state of the law, courts are required to award court costs and actual attorney fees even when various conditions have *not* been satisfied.

This case presents a good vehicle for review because MCL 15.271(4)'s three conditions have not been satisfied. The plaintiff did not succeed in obtaining injunctive relief to compel compliance or enjoin further noncompliance with the Open Meetings Act. The Court of Appeals in its decision of January 22, 2013 granted declaratory relief to Mr. Speicher because it was "clear from the record that the defendants did not post notice of this change [the change to quarterly rather than monthly meetings] on or before October 21, 2011, i.e., within 3 days of the October 18, 2011, meeting at which the Commission changed its regular meeting schedule." (Exhibit F, *Speicher v Columbia Twp Bd of Trustees et* al, Docket No 306684 at 1 (Mich Ct App January 22, 2013).

But no injunction was entered by the circuit court, and its denial of injunctive relief was affirmed by the Court of Appeals and retained on rehearing. In other words, at each stage of the proceedings the lower courts agreed with the defendants that no injunctive relief was appropriate. The Court of Appeals explained that the trial court "correctly denied plaintiff's request for injunctive relief":

> While the Commission's failure to timely post its new meeting schedule was a technical violation of the OMA, there was no evidence that the Commission had a history of OMA violations, there was no evidence that this violation was done willfully, and there was no evidence that the public was harmed in any manner by this OMA violation. Plaintiff claims that he was injured because he was unable to present various issues to the Commission at the February and March 2011 meetings that were cancelled. In other words, plaintiff claims injury resulting from the meeting schedule change and not from defendant's *failure to timely post the schedule change*. As conceded by plaintiff at oral argument, defendant did not violate the OMA by changing its regular meeting from monthly to quarterly. Moreover, it is clear from the record that plaintiff did not suffer the injury he claims to have suffered, as it is undisputed that plaintiff had the same opportunity as every other citizen to address the Commission at the meetings it did old, and plaintiff presented the issues he was concerned about to the Commission at the December 2010, January 2011, and the April 2011 meetings. Thus, because his alleged "injuries" were not caused by the OMA violation, no injunctive relief was warranted. (Emphasis in original).

In other words, the Court of Appeals concluded that although a technical violation of the notice provision might have occurred, no history of violations or evidence that the violation was willful or deliberate appeared anywhere in the record. In addition and equally important, the Court of Appeals agreed with the trial court that Mr. Speicher failed to show that he was injured by the claimed violation because "it is undisputed that plaintiff had the same opportunity as every other citizen to address the Commission at the meetings it did hold, and plaintiff presented the issues he was concerned about to the Commission at the December 2010, January 2011, and the April

2011 meetings." (Exhibit F, *Speicher v Columbia Twp Bd of Trustees et* al, Docket No 306684, slip op, January 22, 2013, p 2).

On rehearing, the Court of Appeals vacated "that portion of this Court's opinion Issued January 22, 2013 at to attorney fees". (Exhibit G, *Speicher v Columbia Twp Bd of Trustees et* al, Docket No 306684, Order, December 19, 2013). And the opinion issued on rehearing in conjunction with that order makes clear that in the Court's view an award of court costs and attorney fees is mandated "only when the plaintiff has obtained injunctive relief." (Exhibit G, *Speicher v Columbia Township Board of Trustees and Columbia Township Planning Commission*, No 306684 at 3 (Mich Ct App December 19, 2013). The Court of Appeals reasoned that when a plaintiff has obtained declaratory but not injunctive relief, he has not satisfied the requirements of MCL 15.271(4). (Exhibit G, *Speicher v Columbia Township Board of Trustees and Columbia Township Planning Commission*, No 306684 at 2-3 (Mich Ct App December 19, 2013). But the Court felt compelled to follow the "Court's prior determinations that MCL 15.271(4)'s third element is satisfied as long as *any* relief is granted." (*Id.* at p 3). In doing so, the Court cited prior decisions awarding costs and attorney fees for any violation of the Open Meetings Act.

But the Court also noted the more recent decision in *Leemreis v Sherman Twp*, 273 Mich App 691; 731 NW2d 787 (2007) holding that by seeking only declaratory relief, not injunctive relief, the landowner-plaintiffs were not entitled to an award of attorney fees.

The *Leemries* Court emphasized that the Open Meetings Act provides "for three distinct types of relief." 273 Mich App at 700. Under MCL 15.270(2) a person can "seek invalidation of the decision and there is not provision for costs or attorney fees." 273 Mich App at 700. Under MCL 15.271(1) a person may commence a civil action for injunctive relief and obtains "relief in the action" recover costs and attorney fees. MCL 15.271(4). And finally, MCL 15.273 allows for an action against a public official for an intentional violation of the Act, and provides for relief by way of 'actual and exemplary damages of not more than $500 total 'plus court costs and actual attorney fees to a person or group of persons bringing the action." MCL 15.273(1). The *Leemreis* Court observed that "none of these sections refers to either of the other sections." As a result, by reading the statute as a whole, the Court concluded that "these sections, and the distinct kinds of relief that they provide stand alone." 273 Mich App at 793.

Under this reading of the plain language of the statute, a person must succeed in obtaining injunctive relief before he or she may recover attorney fees thereunder. Speicher is not entitled to an injunction; so the trial court found, and its ruling denying an injunction was affirmed on appeal and on reconsideration on appeal. Even though the Planning Commission may have failed to timely post its new meeting schedule, a technical violation of the Open Meetings Act, the record lacked any evidence that the Planning Commission had a history of violations or that the claimed violation was done willfully. Also absent is any evidence that the public was harmed in any manner by the

alleged violation. Beyond that, upon a close examination of Speicher's claims, any alleged injury to Speicher resulted from the meeting schedule change and not from the Planning Commission's failure to timely post a schedule change.

As conceded by Mr. Speicher at the time of oral argument in the Court of Appeals, the Planning Commission did not violate the Open Meetings Act by changing its regular meeting schedule from monthly to quarterly. Moreover, it was clear from the record that Speicher did not sustain the injury he claims to have suffered. The record establishes that Speicher was afforded the same full opportunities as every other citizen to address the Planning Commission. Speicher used those opportunities to present the issues about which he was concerned to the Planning Commission in December of 2010, January of 2011, and April, 2011. Therefore, any claimed injuries allegedly suffered by Speicher were not caused by any Open Meetings Act violation and no injunctive relief is warranted.

Effect is properly given to each word and phrase when interpreting a statute. The phrase "relief in the action" as found in MCL 15.271(4) must have meaning. In choosing those words, the Legislature intended to restrict the circumstances under which a plaintiff would be entitled to costs and attorney fees under the Open Meetings Act. Michigan courts have correctly recognized that a past violation of the Open Meetings Act, by itself, is not sufficient "to constitute a real and imminent danger of irreparable injury" to support an injunction. *Wilkins v Gagliardi*, 219 Mich App 260, 275-

276; 556 NW2d 171 (1996). Thus, in *Wilkins*, the Court of Appeals acknowledged that injunctive relief was not available merely because a technical past violation of the Open Meetings Act took place:

> Again, because the board acknowledged that the public is permitted to videotape meetings and because no evidence suggests that defendants or other members of the public were prevented from recording future meetings, defendants did not establish a "real or imminent danger of irreparable injury.

(*Id.* at 276). See also *Saline Area Schools v Mullins*, 2007 WL 1263974 at 1(No 272558, Mich Ct App May 1, 2007) (unpublished) (declining to award costs and attorney fees because the trial court did not enter an order or judgment compelling compliance with the Open Meetings Act or enjoining noncompliance or invalidating any decision by the government entity).

Similarly, in *Felice v Cheboygan County Zoning Commission*, 103 Mich App 742; 304 NW2d 1 (1981), the Court declined to award costs and attorney fees despite "an admitted violation of the act by the defendants" because MCL 15.271(4) was not satisfied. The *Felice* court required a party seeking such relief to show more than that, after an action was brought under the Open Meetings Act, the defendant acted in a manner consistent with the plaintiff's prayer for relief. The *Felice* court explained that the provision included the phrase "relief in the action" which reflected the Legislature's intent "to restrict the circumstances under which a plaintiff would be entitled to costs and actual attorney fees." (*Id.* at 746). *Felice* illustrates the proper reading of the statute;

but it also underscores the inconsistent and conflicting decisions that have been issued by the Court of Appeals when addressing relief under the Act[5].

Applying the plain language of the statute as interpreted in *Felice* and *Mullins*, Speicher should not have been able to recover costs and attorney fees. But applying the conflicting authority, the court is obligated to award costs and actual attorney fees. The circuit court disagreed with Speicher's position, denied injunctive relief, and gave no judgment in his favor. The record is clear, Speicher was not entitled to an injunction and no award of attorney fees and costs should have been made to him under the statute. *Ridenour v Bd of Education of the City of Dearborn School District*, 111 Mich App 798; 314 NW2d 760 (1982). If there is no reason to believe that a public body will deliberately fail to comply with the Open Meetings Act in the future, injunctive relief is unwarranted, *Nicholas, supra.* In short, a proper reading of the statute requires a reversal.

C. The current muddled history and confused state of the law support a grant of leave to appeal here.

Defendants-Appellants seek leave to appeal to consider whether the Open Meetings Act requires recovery of court costs and actual attorney fees when no injunctive relief was awarded in the action. The question of when costs and attorney

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[5] To be sure, *Felice* was issued before 1990 and thus is not precedentially binding. But its existence coupled with the Court of Appeals call for a conflict panel and disagreement with existing law in this case surely demonstrates a need for review by this Court.

fees is significant. And the law is currently muddled with a line of decisions, which are listed in the Court of Appeals order vacating its decision in this case insofar as it pertained to attorney fees, holding that attorney fees and court costs must be awarded any time regardless of whether the plaintiff succeeded in obtaining an injunction. At the same time, other published opinions offer conflicting analysis. See *Leemreis v Sherman Twp*, 273 Mich App 691, 707-709; 731 NW2d 787, 795-797 (2007); *Felice v Cheboygan County Zoning Commission*, 103 Mich App 742; 304 NW2d 1 (1981); *Saline Area Schools v Mullins*, 2007 WL 1263974 at 1 (No 272558, Mich Ct App May 1, 2007) (unpublished) .

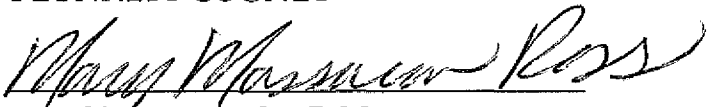
Now, the Court of Appeals has published a decision laying out the history with its conflicting approach to interpreting the statute and expressing disagreement with the current state of the law, and in the absence of precedent from this Court interpreting this provision of the Open Meetings Act, Defendants-Appellants urge review and a reversal of the decision remanding for an award of costs and attorney fees in this case. Defendants-Appellants believe that this Court should read the plain language of the statute and squarely hold that no costs or attorney fees are to be awarded here because of the absence of injunctive relief.

RELIEF

WHEREFORE, Defendants-Appellants Columbia Township Board of Trustees and Columbia Township Planning Commission respectfully request the Court peremptorily reverse the Court of Appeals for the reasons articulated by the Court in its call for a special panel, or failing that, grant this application for leave to appeal and rule that costs and attorney fees are not statutorily authorized here, and enter any and all other relief this Court deems proper in law and equity.

Respectfully submitted,

PLUNKETT COONEY

BY: 

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Dated: January 29, 2014